

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

Louis Marks,

Plaintiff,

v.

State of Nevada, *et al.*,

Defendants.

Case No. 2:18-cv-01421-RFB-BNW

ORDER re ECF No. 50

Presently before the Court is *pro se* plaintiff Louis Mark's second¹ motion for appointment of counsel (ECF No. 50), filed on November 18, 2021. Defendant Vincent Lorenz opposed at ECF No. 54. Plaintiff did not file a reply. The Court held a hearing via Zoom video conference on February 1, 2022, where Plaintiff and Defendant were both present.

Plaintiff moves under both 28 U.S.C. § 1915(e)(1) and 28 U.S.C. 2254(h) to argue that appointment of counsel is appropriate in this case. But the Court construes Plaintiff's request proper only under only 28 U.S.C. § 1915(e)(1), as this case does not relate to a federal *habeas corpus* proceeding but, rather, a § 1983 claim.

I. Background

Mr. Marks, who is currently in custody at Southern Desert Correctional Center ("SDCC"), alleges an Eighth Amendment unsafe prison conditions claim. ECF No. 7 at 4–6. More specifically, he alleges that Defendant learned on at least two occasions, including from a unit officer, that a table at the SDCC facility was unbolted and broken. *Id.* at 4, 9–10. But despite knowing of this allegedly unsafe condition, Defendant failed to provide any warnings to others

¹ Plaintiff first moved for appointment of counsel at the same time that he initiated this case in July of 2018. *See* ECF No. 2. The Hon. Judge Boulware denied Mr. Marks' motion without prejudice, noting that the court did not "find exceptional circumstances that warrant the appointment of counsel." ECF No. 11 at 8.

1 regarding this alleged defect. *Id.* at 4. As a result, Plaintiff alleges that he unknowingly sat on the
2 broken table and seriously injured his hip, pelvis, and back. *Id.*

3 Mr. Marks now requests a court-appointed attorney, arguing that he is unable to afford
4 counsel, the “substantive issues and procedural matters in this case are too complex[,]” and he is
5 unable to investigate and complete other discovery, including taking depositions, because he is
6 incarcerated. ECF No. 50 at 1-2. He also notes that his “sentence structure is ____[,]” which the
7 Court understands to mean that Plaintiff has a basic grasp of writing. *Id.* at 2.

8 Additionally, Plaintiff contends that appointing counsel would not only help him in
9 presenting and litigating his case, but it also would help more efficiently facilitate proceedings.
10 *Id.*

11 Finally, Plaintiff argues that the “ends of justice would best be served” if counsel is
12 appointed. *Id.*

13 Defendant opposes Mr. Marks’ request. He argues that Plaintiff does not have a
14 constitutional right to counsel to litigate a § 1983 claim; Plaintiff has not shown an inability to
15 articulate his claims without counsel, as previous filings are “cogent and well-articulated with
16 respect to both the law and facts[;]” Plaintiff’s case is not complex enough to require counsel; and
17 Plaintiff has not demonstrated that he is likely to succeed on the merits. ECF No. 54 at 1–3.
18 Defendant further notes that a court may not appoint counsel to aid a plaintiff with discovery. *Id.*
19 at 2. Finally, he argues that Plaintiff’s reasons for seeking appointment of counsel do not
20 constitute “the type of special circumstances that warran[t] appointment of counsel.” *Id.*

21 **II. Discussion**

22 Civil litigants do not have a Sixth Amendment right to appointed counsel. *Storseth v.*
23 *Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981). In very limited circumstances, federal courts are
24 empowered to request an attorney to represent an indigent civil litigant. For example, courts have
25 discretion, under 28 U.S.C. § 1915(e)(1), to “request” that an attorney represent indigent civil
26 litigants upon a showing of “exceptional circumstances.” *Agyeman v. Corrections Corp. of Am.*,
27 390 F.3d 1101, 1103 (9th Cir. 2004).
28

1 To determine whether the “exceptional circumstances” necessary for appointment of
 2 counsel are present, the court evaluates (1) the likelihood of plaintiff’s success on the merits and
 3 (2) the plaintiff’s ability to articulate his claim *pro se* “in light of the complexity of the legal
 4 issues involved.” *Agyeman*, 390 F.3d at 1103 (quoting *Wilborn*, 789 F.2d at 1331). A court may
 5 find that “exceptional circumstances” exist if a claim is either factually or legally complex. *See*,
 6 *e.g.*, *McElyea v. Babbitt*, 833 F.2d 196, 200 n.3 (9th Cir. 1987) (per curiam) (suggesting that a
 7 plaintiff’s claim concerning the provision of religious books in prison raises “complicated
 8 constitutional issues”).

9 Neither of these factors is dispositive and both must be viewed together. *Wilborn*, 789
 10 F.2d at 1331. It is within the court’s discretion whether to request that an attorney represent an
 11 indigent civil litigant under 28 U.S.C. § 1915(e)(1). *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir.
 12 2009).

13 **A. Whether Mr. Marks’ claim has a likelihood of success on the merit**

14 Here, Mr. Marks’ Eighth-Amendment claim has a likelihood of success on the merits.
 15 This is because he pled two claims in his complaint (i.e., deliberate indifference to unsafe prison
 16 conditions and deliberate indifference to serious medical needs) and one—deliberate indifference
 17 to unsafe prison conditions—survived the Court’s screening process. ECF No. 11 at 5. The Hon.
 18 Judge Boulware subsequently affirmed the screening order in response to Defendant’s motion to
 19 dismiss. *See* ECF No. 45 (“The Motion to Dismiss [at ECF No. 25] is DENIED in part and
 20 GRANTED in part. The Court denies the Motion to the exten[t] it seeks dismissal of the Eighth
 21 Amendment claim that the Court permitted to proceed pursuant to its Screening Order [at ECF
 22 No. 11]. This claim shall proceed for the same reasons identified in the Order [at ECF No. 11].
 23 The Court grants the Motion as to the dismissal of the monetary damages claim against Defendant
 24 Lorenz in his official capacity. *Fowler v. Guerin*, 918 F.3d 644, 647 (9th Cir. 2019).”).

25 “The Ninth Circuit has indicated that the articulation of a cognizable claim for relief may
 26 itself be sufficient to satisfy the ‘merit’ analysis on a motion for appointment of counsel.” *Turner*
 27 *v. Riaz*, No. 216CV0969MCEACP, 2018 WL 5962726, at *4 (E.D. Cal. Nov. 14, 2018). This
 28 factor, therefore, weighs in favor of appointing counsel.

1 Of note, Defendant argued at the motion hearing that Plaintiff's claim or theory of the
2 case has changed, and this change cuts against his likelihood of success on the merits. While the
3 Court finds that it is the screening order that controls for purposes of determining whether
4 Plaintiff has a likelihood of success on the merits, it will, nonetheless, address Defendant's
5 argument.

6 According to Defendant, Plaintiff's complaint alleges that Plaintiff sustained serious
7 injuries because the table had no bolts whereas in his motion to appoint an expert witness (at ECF
8 No. 41), Plaintiff suggests that he was injured because the table had the wrong bolts.

9 At the hearing, Plaintiff, who has been proceeding *pro se*, represented that others helped
10 compose his previous motions and other filings. This was clear to the Court in light of the
11 different handwriting styles. *See, e.g.*, ECF Nos. 10, 32, 41. Additionally, Plaintiff explained that
12 the reason he stated the wrong bolts had been placed on the table is because others had made that
13 representation to him. As such, Plaintiff's uncounseled statements in the motion to appoint an
14 expert witness (1) do not suggest a change of theory of prosecution and (2) have no bearing on
15 the merits for purposes of this motion to appoint counsel.

16 **B. Whether Mr. Marks has an ability to articulate his claim *pro se* "in light of the**
17 **complexity of the legal issues involved"**

18 The parties dispute whether Mr. Marks can articulate his claims *pro se* "in light of the
19 complexity of the legal issues involved." *See* ECF No. 50 at 1, ECF No. 54 at 2–3.

20 For the reasons discussed below, the Court will exercise its discretion to appoint counsel
21 for Mr. Marks.

22 First, as revealed at the hearing, Plaintiff has a ninth-grade education and is unable to
23 understand the language used by the Court. In the hearing, it was further revealed that he had
24 others help him draft motions and other court filings, but these individuals are no longer available
25 to him. As a result, he no longer has anyone who can help him with litigating this case, and he
26 lacks the ability to do so on his own.

1 Mr. Marks' inability to litigate this case is apparent for several reasons. For example, his
2 response to the Defendant's motion to dismiss, which he identified as a response to a motion for
3 summary judgment, included no legal support or citations apart from one conclusory sentence at
4 the end noting that Defendant's actions violated NRS Chapter 209 and the Eighth Amendment
5 against cruel and unusual punishment. *See* ECF No. 32 at 3–4. Additionally, many of the filings
6 have different handwriting styles, which supports the fact that others have been drafting
7 Plaintiff's filings on his behalf. *See, e.g.*, ECF Nos. 10, 32, 41. Furthermore, Plaintiff has, at
8 times, used template forms, reinforcing the notion that he is unable to litigate this case
9 independent of external support. *See, e.g.*, ECF Nos. 2, 13. Moreover, at the hearing he explained
10 that he no longer had anyone assisting him.

11 Second, Plaintiff needs to interview several witnesses who were present at the scene of the
12 alleged fall. These witnesses, as Plaintiff represented at the hearing, may or may not be
13 incarcerated. The Court recognizes the difficulties that a *pro se*, incarcerated litigant faces in
14 locating and deposing witnesses, particularly those who are also incarcerated but at different
15 facilities. While this factor would not, by itself, justify the appointment of counsel, it is an
16 additional factor this Court considers.

17 Third, the Court recognizes that appointing counsel in this case would allow proceedings
18 to "undoubtedly proceed more efficiently and effectively." *Johnson v. California*, 207 F.3d 650,
19 656 (9th Cir. 2000) (per curiam).

20 Finally, while the Court acknowledges that the Hon. Judge Boulware previously denied
21 (without prejudice) Plaintiff's first motion for appointment of counsel, which was filed at the
22 same time as the complaint in 2018, it also recognizes that it now has information that was not
23 previously before the Court.

24 Accordingly, these circumstances warrant the appointment of *pro bono* counsel in this
25 case.

26 **III. Conclusion and Order**

27 Because the Court will exercise its discretion to appoint counsel and grant Mr. Marks'
28 motion for appointment of counsel, it will refer the case to the Court's Pro Bono Program to


1 attempt to find an attorney to accept Plaintiff's case. Mr. Marks should be aware that the Court
2 has no authority to require attorneys to represent indigent litigants in civil cases under 28 U.S.C.
3 § 1915(d). *Mallard v. U.S. Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296, 298 (1989).
4 Rather, when a court "appoints" an attorney, it can only do so if the attorney voluntarily accepts
5 the assignment. *Id.* Additionally, **Mr. Marks is reminded that until counsel is appointed, he is**
6 **still responsible for complying with all deadlines in his case.** If counsel is found, an order
7 appointing counsel will be issued by the Court, and Mr. Marks will be contacted by counsel.

8 **IT IS THEREFORE ORDERED** that Plaintiff Louis Marks' motion for appointment of
9 counsel (ECF No. 50) is GRANTED.

10 **IT IS FURTHER ORDERED** that this case is referred to the Pro Bono Program adopted
11 in Second Amended General Order 2019-07 for the purpose of screening for financial eligibility
12 (if necessary) and identifying counsel willing to be appointed as *pro bono* counsel for Plaintiff.
13 The scope of appointment shall include the discovery phase through the termination of the case—
14 whether at the dispositive motion phase or trial. Plaintiff is reminded that he must comply with all
15 deadlines currently set in his case and there is no guarantee that counsel will be appointed. If
16 counsel is found, an order appointing counsel will be issued by the Court, and Plaintiff will be
17 contacted by counsel. In addition, the Court will schedule a status hearing to further delineate the
18 scope of representation.

19 **IT IS FURTHER ORDERED** that the Clerk of Court must forward this order to the Pro
20 Bono Liaison.

21
22 DATED: February 1, 2022.

23
24 
25 BREND A WEKSLER
26 UNITED STATES MAGISTRATE JUDGE
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